Title: New Provisions of Polish Law Concerning Arbitration : selected issues

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NEW PROVISIONS OF POLISH LAW CONCERNING ARBITRATION – SELECTED ISSUES

I. INTRODUCTION

Nowadays arbitration proceedings are considered to be one of the most popular methods of resolving legal disputes. The most important advantages are usually associated with the speed and flexibility of the procedure, confidentiality, a professional board of arbitrators and the relatively (in comparison with court litigation) low costs of the proceedings. The growing application of arbitration particularly in commercial disputes was the main reason for introducing necessary changes into the Polish law provisions relating to arbitration. The new provisions of the Polish Code of Civil Procedure concerning arbitration came into force in 17th October 2005.[1] These provisions are included in the new part five of the Code of Civil Procedure titled "Arbitration".[2] The new regulation is recognized as an essential change since it not only meets the requirements of entrepreneurs but also takes into consideration international arbitration standards, in particular the UNCITRAL Model Law on International Commercial Arbitration.[3] This article is focused on presenting the most important changes in the field of arbitration relating, in particular, to an arbitration agreement and the principles of arbitration procedure.

[1] Polish Act of 17 November 1964 – Code of Civil Procedure (Dz.U. of 1964, no. 43, item 296) – new provisions concerning arbitration that came into force on 17 October 2005, hereinafter referred to as Code of Civil Procedure or of the CCP.

[2] This article presents the provisions of the Code of Civil Procedure on the basis of an unofficial translation into English of an excerpt from Polish Act of 17 November 1964 – Code of Civil Procedure (Dz.U. of 1964, no. 43, item 296) – new provisions concerning arbitration that came into force on 17 October 2005. Translation – Łucja Nowak; consultations – Lovells and ICC Poland, published on the website of the Court of Arbitration at the Polish Chamber of Commerce (www.sakig.pl/upfiles/pdf/kpc-ang.pdf).

[3] K. Falkiewicz, R. L. Kwaśnicki, *Arbitraż i mediacja w świetle najnowszej nowelizacji kodeksu postępowania cywilnego*, Przegląd Prawa Handlowego 2005 nr 11, p. 32–33. UNCITRAL Model Law on International Commercial Arbitration of 1985 was adopted by United Nations Commission on International Trade Law and then recommended by United Nations General Assembly as a model for subsequent national legislative texts on arbitration, see also R. Morek, *Mediacja i arbitraż (art. 183.1–183.15, 1154–1217 Kpc). Komentarz*, Warszawa 2006, p. 105.

II. GENERAL PROVISIONS

1.THE SCOPE OF APPLICATION

The provisions of the Polish Code of Civil Procedure concerning arbitration apply if the place of arbitration1 takes place on the territory of Poland. In particular cases they are also applied when the location of the arbitration is outside the borders of Poland or is not determined (art. 1154 of the CCP). According to the general rule regarding the location of arbitration, the parties to the dispute have the right to choose the location of the arbitration. In the case of failure to reach such agreement, this shall be determined by the arbitral tribunal. When indicating the location of arbitration, the arbitral tribunal is obliged to take into account the subject matter of the proceedings, the circumstances of the case and convenience for the parties involved. The new provisions of the CCP also introduce the presumption that the location of arbitration is on the territory of Poland if the final award was issued on that territory and the location of arbitration was not agreed by the parties or determined by the arbitral tribunal (art. 1155 of the CCP).[4]

2. JURISDICTION OF POLISH COURTS

The provisions of the CCP specify the limits of the national jurisdiction of Polish courts. According to art. 1156 Polish courts have jurisdiction in cases regulated in art. 1154–1217 of the CCP if the location of arbitration is on the territory of Poland. Polish courts also have jurisdiction where the provisions of the CCP provide for court functions in connection with arbitration proceedings taking place outside the borders of Poland or when the location of arbitration is not determined.

One of the most important changes introduced in the Polish law on arbitration refers to the regulation of the relationship between litigation conducted before state courts and arbitration proceedings. Art. 1159 of the CCP stipulates that in matters regulated by the provisions of the CCP concerning arbitration, the court may only exercise the functions allowed by the statute. In cases where the state court may act in connection with the proceedings before the arbitral tribunal, the court's decisions may be appealed only if allowed by the statute.

The legal consequence of such a regulation is that the parties have an opportunity to deprive the state court of the power to adjudicate the case if they conclude an arbitration agreement. This regulation has been introduced in order to strengthen the position of arbitral tribunals in Poland and to prevent the state courts from unfounded intervention in arbitration procedures. Taking into consideration the previous experiences connected with the attempts of the state courts to interfere with the arbitration procedures, the provisions of art. 1159 of the CCP seem to have very important meaning for arbitral tribunals.[5]

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[4] R. Lewandowski, *Polish Commercial Law: An Introduction*, Warszawa 2007, p. 236.

[5] R. Lewandowski, *Polish Commercial Law...*, p. 236. It is worth stressing that in Polish legal language there is no equivalent word for the English term *arbitrability* that is used to describe the scope of the issues that may be submitted to arbitration, see also: K. Falkiewicz, R. L. Kwaśnicki, *Arbitraż i mediacja...*, Przegląd Prawa Handlowego 2005 nr 11, p. 33.

3. THE CATEGORIES OF DISPUTES THAT MAY BE SUBMITTED TO ARBITRATION

The essential change in arbitration procedure in Poland introduced in the new provisions refers to the extension of the scope of the legal disputes that may be submitted to arbitration. Art. 1157 of the CCP provides that if a statutory provision does not state otherwise, the parties may submit to arbitration proprietary disputes or non-proprietary disputes that may be subject to court settlement, excluding claims for alimony. This provision gives the parties the opportunity to seek a resolution of the dispute before the arbitral tribunal in a wider range of issues than was possible under the previous regulation. The repealed Polish law on arbitration allowed submission to arbitration only for pecuniary claims, except for the claims for alimony and claims arising out of employment relationships. This quite narrow scope of legal disputes that could be resolved in an award issued by an arbitral tribunal was often criticized by lawyers since it was inconsistent with the expectations of entrepreneurs.[6] In contrast to these provisions the new arbitration law stipulates that in general all claims ensuing from property rights may be submitted to an arbitral tribunal. It is worth mentioning that nowadays disputes arising out of the employment laws may also be the subject matter of an arbitration procedure. However the provisions of art. 1164 of the CCP introduces conditions that an arbitration agreement concerning employment disputes can only be made after the dispute arises and must be in writing.

III. ARBITRATION AGREEMENT

1. THE DEFINITION

The new provisions of the Polish Code of Civil Procedure concerning arbitration agreements introduce regulation that is more extensive and more precise than the regulation that was in force under the previous law. The importance of the arbitration agreement results from the fact that it enables the submission of the dispute to arbitration and it constitutes the basis of competence of the arbitral tribunal. According to the definition contained in art. 1161§1 of the CCP, an arbitration agreement is an agreement between parties concluded in order to submit the dispute to be resolved in an arbitration proceeding. In the arbitration agreement the parties should determine the subject matter of the dispute or a legal relationship from which the dispute may arise or has arisen. Designating the legal dispute or a legal relationship from which the dispute may arise or has arisen is considered to be an obligatory part of an arbitration agreement. It follows that it is not admissible to conclude an arbitration agreement that refers to all future and possible disputes without determining a legal relationship from which they may arise.[7]

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[6] R. Lewandowski, *Polish Commercial Law...*, p. 236.

[7] J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, *Postępowanie cywilne*, Warszawa 2005, p. 499.

The parties have the opportunity to introduce to the arbitration agreement many and varied provisions considering a wide scope of legal issues. They have the right to determine the number of arbitrators and the procedure for appointing them, they can choose the language in which the proceedings will be conducted and even agree on the rules and procedures of the arbitration. According to the provisions of art. 1161 § 3 of the CCP, the parties in the arbitration agreement may indicate an arbitral institution as having jurisdiction. Unless otherwise agreed by the parties, they are bound by the rules of the arbitral institution in force at the time of the conclusion of the arbitration agreement. However, the regulations of Code of Civil Procedure guarantee protection against introducing into the arbitration agreement clauses that may violate the principle of the equality of the parties. The law stipulates that the provisions of the arbitration agreement are ineffective if they infringe on the principle of the equality of the parties, in particular entitling only one of the parties to file a request for arbitration or a statement of claim before a court (art.1161 §2 of the CCP).

2. CONDITIONS CONCERNING THE FORM OF THE ARBITRATION AGREEMENT

The new provisions of the Code of Civil Procedure lay down many detailed conditions relating to the form of an arbitration agreement. First of all an arbitration agreement shall be prepared in written form. This requirement is also fulfilled when the agreement is contained in an exchange of documents or statements made by means of communication that provides a record of their content. The requirement to conclude an arbitration agreement in writing is also recognized as being fulfilled when the parties introduce a reference to a document containing an arbitration clause into the contract provided that the contract is in writing and the reference is such as to make that clause a part of the contract (art. 1162 of the CCP). Thus the provisions of art. 1162 §2 of the CCP provide that an arbitration agreement may be concluded not only as a separate agreement but may also be included in the main agreement regulating the legal relationship between the parties and in such a situation it constitutes so-called arbitration clause.[8] An arbitration agreement may be contained in the articles of association (statutes) of a commercial company. When it refers to the disputes of a corporate relation, it is binding on the company and its shareholders. This rule is applied accordingly to arbitration agreements contained in the statute of a cooperative or an association (1163§1 and §2 of the CCP).

Legal issues relating to the opportunity to conclude an arbitration agreement by an attorney were considered to be quite controversial before the new provisions on arbitration were adopted. One of the most debatable problems referred to the possibility of concluding an arbitration agreement by the attorney and to the question of whether this required a special power of attorney granted by a represented person. According to the opinion of most representatives of the legal doctrine, the requirement to possess a special power of attorney in spite of receiving a general power of attorney for a lawsuit was too restrictive. However, the Supreme Court did not agree with this position. The new art. 1167 of the CCP deals with these doubts since it provides that the power of attorney to perform a legal act granted by a business

[8] J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, *Postępowanie*..., p. 500.

entity includes the power to agree to submit disputes arising out of such legal act to arbitration, unless the power of attorney stipulates otherwise. The enforcement of the new provisions of art. 1168 of the CCP has resolved the problems that arose in the situation where a person nominated by the parties in the arbitration agreement to be an arbitrator refuses to act in this function or when he is unable to act for any other reason and when the arbitral tribunal identified in the agreement refuses to hear the case or it is impossible for this tribunal to arbitrate the case for any other reason. In these situations the arbitration agreement expires unless otherwise agreed by the parties.[9]

3. LEGAL CONSEQUENCES OF THE ARBITRATION AGREEMENT

Concluding an arbitration agreement creates specific consequences in law, in particular for any litigation conducted by the state court. According to the provisions of art. 1165 §1 of the CCP in the event of submitting to the court a case relating to a dispute which is subject to an arbitration agreement, the court shall reject the statement of claim or application to start proceedings if the respondent or participant of the non-trial proceedings makes a plea that there is an arbitration agreement before submitting his first statement on the substance of the dispute. However, the court will not reject the claim or application to start proceedings if the arbitration agreement is null and void, inoperative, incapable of being performed or has expired and/or if the arbitral tribunal has ruled it does not have jurisdiction. Bringing an action in the courts does not prevent the arbitral tribunal from proceeding with the case (art. 1165 § 1,2,3 of the CCP). These rules also apply when the location of arbitration is outside the borders of the Republic of Poland or has not been determined (1165 § 4 of the CCP). These provisions stipulate that it is possible to tender a plea of concluding an arbitration agreement indicating the foreign arbitral tribunal effectively before the Polish court; thus there is also an opportunity to invoke an arbitration agreement when an arbitration proceeding takes place abroad.[10]

An arbitration agreement excludes the possibility to adjudicate the case in a state court in the event of tendering such a plea by a defendant within a proper time. However, according to art. 1166 of the CCP, the submission of a dispute for resolution by arbitration does not exclude the possibility of granting interim measures of protection by the court in respect to claims pursued before the arbitral tribunal. The parties also have an opportunity to move for securing the claims when the location of arbitration is outside the borders of the Republic of Poland or has not been determined.

[9] K. Falkiewicz, R. L. Kwaśnicki, *Arbitraż i mediacja...*, Przegląd Prawa Handlowego 2005 nr 11, p. 34.

[10] J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, *Postępowanie...*, p. 501.

III. CONDUCT OF ARBITRAL PROCEEDINGS

1. GENERAL PRINCIPLES

The most important rules of arbitration proceedings have been stipulated in the provisions of art. 1183 of the CCP. This article provides that in arbitral proceedings the parties shall be treated equally and each of the parties has the right to be heard and to present its case. The principle of equality of the parties involved in an arbitration proceeding has also been expressed in the regulations concerning an arbitration agreement according to which the provisions of the arbitration agreement are ineffective if they infringe the principle of equality of the parties, in particular entitling only one of the parties to file a request for arbitration to the arbitral tribunal indicated in the agreement or to bring an action to the court (art. 1161 § 2 of the CCP).

The principle of equality is considered to be a fundamental procedural rule of the Polish Code of Civil Procedure. The principle of equality prescribes that each party of the dispute that take part in the litigation should have the opportunity to respond to allegations and motions of the other party by equal means. However the interpretation of this rule seems to be quite controversial, since it is necessary to take into account not only the literal meaning of the legal provisions but also the principle of freedom of contract and habits accepted in commercial relationships. A literal interpretation of the rule of equality leads to the conclusion that every provision of an arbitration agreement that favours one party over another should be deemed as null and void.[11] But it is worth stressing that arbitration agreements concluded in practice, in particular in international commercial arbitration, often contain provisions that give a more privileged position to one of the parties involved in the arbitration. This usually occurs when the parties agree to choose the language in which the procedure will be conducted or the location of arbitration. For example the English language is usually applied in resolving disputes between entrepreneurs who come from Poland and Great Britain and the parties very rarely agree to choose the country that is connected neither with the plaintiff nor with the defendant. In this context it is possible to draw a conclusion that the principle of equality should not be interpreted very restrictively. In particular in commercial relationships this rule should not be used in order to exclude the principle of freedom of contract and accepted practices and commercial habits. According to art. 1161§2 of the CCP the provisions of an arbitration agreement that infringes the principle of equality are not treated as null and void but merely as ineffective. This means that the restrictions included in an arbitration agreement that gives only one party the right to file a request for arbitration or bring an action to the court has no legal consequences.[12]

One of the most important rules of arbitration proceedings is enabling the parties to have an influence on the choice of the procedure. In the event of failing to reach such an agreement, the arbitral tribunal may conduct the proceedings in such a manner as it considers appropriate. The arbitral tribunal is not bound by the provisions relating to court proceedings (art. 1184 of the CCP).

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[11] R. Lewandowski, *Polish Commercial Law...*, p. 238.

[12] R. Morek, *Mediacja i arbitraż...*, p. 138–139.

Arbitration proceedings are in principle the procedure of one instance. However, new provisions of art. 1205 § 2 of the CCP introduced the opportunity for the parties to conclude an agreement indicating that arbitration proceedings will encompass more than one instance. This provision does not seem to be legitimate, in particular in light of the assumptions that arbitration proceedings should be conducted quickly and effectively, which is deemed to be the most important advantages of arbitration.[13]

2.MAKING AN AWARD AND TERMINATING PROCEEDINGS

The new regulations of the Code of Civil Procedure concerning the basis of adjudicating a case by the arbitral tribunal are recognized as one of the provisions of the greatest importance. The question of whether the arbitral tribunal is obliged to issue an award based on the provisions of substantive law or if it is empowered to resolve the dispute according to the rule of equity and its own discretion was quite controversial because of the lack of clear regulation in the previous provisions of the Code of Civil Procedure. These doubts have been dealt with by the provisions of the new art. 1194 of the CCP. This article provides that the arbitral tribunal shall decide the dispute in accordance with the law applicable to the transaction and, if expressly so authorized by the parties, on the basis of the general rules of law or rules of equity. In all cases the arbitral tribunal shall consider the provisions of the contract and the usages applicable to the transaction. In light of this regulation it is necessary to emphasize that although the making of an award in accordance with the rules of equity is admissible without doubts, the basic principle is that the dispute should be resolved according to the law applicable to the transaction. Only in the event of clear authorization granted by the parties can the arbitral tribunal ignore the provisions of the applicable law. This regulation is consistent with the provisions of the UNCITRAL Model Law on International Commercial Arbitration.[14]

Arbitration proceedings are terminated not only by the final award but also by a settlement concluded by the parties. According to art. 1196 of the CCP if, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings. The terms of the settlement should be recorded and signed by the parties. At the request of the parties the arbitral tribunal may record the settlement in the form of an award. Such an award has the same effect as any other arbitral award.

The new provisions of the Code of Civil Procedure also regulate legal issues referring to applications to set aside the award of the arbitral tribunal and recognition and enforcement of an arbitral award and the settlement reached before it.

The growing interest in mediation, arbitration and other methods of alternative dispute resolution has created the necessity to change and modernize the provisions of the Code of Civil Procedure concerning arbitration. These changes should be considered as essential and positive. The new regulations are consistent with international standards of arbitration law and take into account the ideas previously ex-

[13] K. Falkiewicz, R. L. Kwaśnicki, *Arbitraż i mediacja...*, Przegląd Prawa Handlowego 2005 nr 11, p. 35.

[14] R. Morek, *Mediacja i arbitraż...*, p 230–232.

pressed only in the judgments and opinions of the representatives of legal doctrine.[15] The latest changes in Polish law in the area of arbitration may be an important step towards making this method of resolving legal disputes more popular in particular in commercial relationships.

[15] K. Falkiewicz, R. L. Kwaśnicki, *Arbitraż i mediacja...*, Przegląd Prawa Handlowego 2005 nr 11, p. 37.